Best Practice for the defence lawyer at the police station during questioning of his client (the suspect or the accused)

mr. J. Boksem
*Criminal defence lawyer (Anker & Anker Strafrechtadvocaten te Leeuwarden)

Ladies and Gentlemen,

This meeting is about enhancing the quality of legal aid. One of the possible instruments to reach this aim is to introduce 'Best Practices' for the lawyer as legal assistance provider. In our country we have a little experience with a 'Best Practice' containing guiding principles upon which the criminal defence lawyer should or could substantively base his (or her) role during (police) questioning. I'll give you a brief introduction.

In the Netherlands the suspect has only recently (since march 1, 2017) right to assistance of a lawyer during police questioning. Questioning a suspect by the police was originally an investigators-tool (a tool in service of finding the truth and reconstructing the facts). In the investigation stage the suspect was only seen as an object of research, and definitely not a full-fledged participant in the proceedings. He was allowed to remain silent, he was allowed to make statements, and he did not explain to truth. But legal assistance (or even: only the presence of a lawyer) during police questioning was in most cases not allowed.

This police interrogation (as an investigators-tool) did fit in in the continental European inquisitorial tradition. In this tradition, the centre of gravity of the criminal procedure was located in the pre-trial stage proceedings. In this stage the evidence was collected and the file was formed. There was little room for the defence.

For a long time criminal defence lawyers called attention to the position of the accused in the pre-trial proceedings. They felt that the suspect particularly in the primary stage of the criminal procedure had an interest in legal aid. After all, in this early stage the accused has to deliberate his trial strategy. He has to make important decisions that could determine the course of the criminal proceedings and the outcome of the case. The accused often finds himself in a particular vulnerable position at that stage of the proceedings, and in most cases this can only be properly compensated for by the assistance of a lawyer, whose task is, among other things, to help to ensure that the right of an accused not to

incriminate himself is respected. Moreover, it is important that the accused is being protected from coercion or oppression by police officers that want to obtain a confession of the suspect. The right to have access to legal advice (and assistance of a lawyer) is a fundamental safeguard against ill-treatment, so the defence lawyers said.

For years, the Dutch Government maintained that it was sufficient for de police to tell the accused prior to the questioning that he has the right to remain silent. There was no need to allow the defence counsel to the interrogation of the accused.
After the judgement of the Grand Chamber of the European Court of Human Rights in the case of Salduz v. Turkey (November 27, 2008) the Dutch Government could no longer maintain this position. The ECHR emphasized that the suspect should have access to a lawyer from the initial stages of the proceedings. I quote:

> "50. The Court reiterates that, even if the primary purpose of Article 6 of the Convention, as far as criminal proceedings are concerned, is to ensure a fair trial by a 'tribunal' competent to determine 'any criminal charge', it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 – especially paragraph 3 thereof – may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions. As the Court has already held in its previous judgements, the right set out in Article 6 § 3 (c) of the Convention is one element, among others, of the concept of a fair trial in criminal proceedings contained in Article 6 § 1.
> (…).
> 52. National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances, Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. (…)
> 53. These principles (…) are also in line with the generally recognised international human rights standards which are at the core of the concept of a fair trial and whose rationale relates in particular to the protection of the accused against abusive coercion on the part of the authorities. They also contribute to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused.
> 54. In this respect, the Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial. At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that

> legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination. (…)
> 55. Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently 'practical and effective', Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated n the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievable prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."

Initially the Government aimed for minimal adjustments. The suspect got the possibility to consult with a lawyer before the first interrogation, and (only) in some (serious) cases (concerning murder and manslaughter) the lawyer was allowed in during the questioning of his client. In these cases the lawyer was not allowed to have any contact with his client or to intervene during the questioning. He was allowed to watch as a spectator (sitting on a chair behind the back of his client or watching the questioning on a screen in an other room), and he was only allowed to interfere when the reporting officers were overstepping their boundaries regarding the ban on pressure. In this way the police questioning remained a useful investigators-tool. The suspect could – after consulting with his lawyer – determine a fitting process strategy. Only in exceptional cases the lawyer could provide legal protection to his clients during interrogation.

After Directive 2013/48/EU was adopted in 2013, it became clear that this minimal regulation was not sufficient at all. The Directive emphasized that the accused has the right to have a lawyer present during the interrogation and that this lawyer is entitled to participate (article 3, paragraph 3(b)). This rights are recently included in article 28d of the Dutch Criminal Procedure Code. This stationary provision came into effect on March 1st 2017.

At the same time the 'Besluit Inrichting en orde politieverhoor' came into effect. In this regulation the participation of the lawyer is bound to certain rules. The police interrogation is as yet an investigators-tool. The lawyer is allowed to make remarks or ask questions at the beginning as well as on the end of the interrogation, but during the questioning itself he is only allowed in a limited number of occasions to intervene. However, he is allowed to point out to the interrogation official that:
- the suspect does not understand the question asked;
- the interrogation officer acts in conflict with the ban on pressure;
- the physical or psychological state of the suspect is in such state that it is not sound to proceed with the interrogation.

Because supplying legal counselling demands an active participation of the lawyer, the Dutch Bar Association ('Nederlandse Orde van Advocaten') compiled own rules in the form of a 'Best Practice' (Defence counsel at police questioning: Protocol). These rules aim on giving the lawyer a handle to intervene before and during the police interrogation.

The 'Best Practice' consists of 8 rules and a checklist. These rules contain no mandatory regulation. They are meant to give the defence lawyer the necessary guiding principles upon which he or she should substantively base his or her role during (police) questioning, so that the assistance can actually be 'practical and effective'.

I will go through the 8 rules:

1. The client's interests are determinative for the way in which the defence lawyer substantively fulfils his work before and during (police) questioning.

This rule emphasizes that the lawyer only has to represent one interest and that is the interest of his client (the suspect). Other interests may conflict with the suspect's legitimate interests, but the lawyer only has to focus on is client's interests. The other participants in the proceedings, such as the judiciary and the police, must be conscious of the special role that the defence lawyer plays. The lawyer is proceeding monitor, representative, confidential counsellor and adviser of his client.

2. The defence lawyer adequately informs his client about the course of the criminal proceedings and about his rights and entitlements.

3. The defence lawyer advises his client on exercising his rights and the entitlements vested with the defence. In addition, he advises his client on the course of action to be adopted during the proceedings.

Only a correctly and fully informed suspect can make the right decisions. Here lies a very important task for the defence lawyer. The suspect must make important decisions that (can) determine the course of the criminal proceedings (and the outcome of the case).
The legislation dictates that the legal assistance prior to questioning lasts no more than 20 minutes. These 20 minutes are often too short to discuss all the relevant subjects with the suspect. I refer to the checklist (that contains many notifications and other topics of conversation). It usually is not a big issue when the lawyer asks the police for additional time for the consultation.

4. The defence lawyer must preform his duties expertly, diligently and to the best of his ability before and during the (police) questioning. He must act professionally at all times.

One expects the defence lawyer, who provides the legal assistance before and / or during the police questioning, to do all that is possible to represent the interests of his client. But of course, not everything is permitted. The end does not justifies the means. For example: The lawyer must respect that the interviewing official holds the presiding role during questioning. At the other hand: this does not mean that the lawyer must refrain from intervening, making comments, making requests, ask for a time-out, etc., at the moment that he sees a reason to do so.

5. A defence lawyer who provides a client with legal assistance prior to questioning that will occur at a police station must ensure that his client does not have to wait for his legal assistance for an unnecessarily long period of time.

The legislation dictates that the lawyer arrives at the police station within 2 hours after the client has been brought in for questioning. For many suspects 2 hours is a very long time. Especially minors should not wait too long for their lawyer.

6. If the defence lawyer discovers a conflict of interests or when there is another reason why he cannot defend a certain suspect, he must ensure that a replacement defence lawyer is alerted immediately.

It goes without saying that the lawyer drops the case when he discovers a conflict of interests or when there is another reason why he cannot defend a certain suspect. Because the client's interests must come first in all cases, it is up to the defence lawyer who is unable – for whatever reason – to provide legal assistance, to organise a replacement defence lawyer.

7. The defence lawyer provides legal assistance during the questioning and ensures that the questioning is performed fairly.

This rule contains no obligation for the defence lawyer to provide legal assistance during police questioning in all of his cases, but emphasizes that the defence lawyer who is admitted to the police questioning is the legal assistance provider. During the (police) questioning he will act with some reserve (but not passively). If necessary, the defence lawyer should conduct an active defence in the interests of his client. He is not just a spectator. This means that het is obliged to intervene when the suspect is questioned in a manner that is in conflict with the ban on pressure or when such a situation threatens to occur. Furthermore, the defence lawyer is obliged to intervene when he sees good reason to do so.
He can advise his client during the questioning if needed. He is obliged to ask the interrogator(s) to pause the questioning so that he may hold a private consultation with is client, or to take a break ('time out'), whenever he considers this necessary. At the beginning and at the end of the questioning the lawyer can ask questions or make comments. During the questioning he will (only) intervene whenever he deems it necessary in his client's interests.
In particular, the defence lawyer ensures that the right to not incriminate oneself and the freedom of choice of the suspect to make statements, answer questions or remain silent are respected. He monitors how his client is treated during the questioning. He monitors whether the procedural rules are observed and whether the questioning proceeds correctly in other respects

8. The defence lawyer ensures that the official report on the interview that is drafted is a correct record of the questioning.

It is very important that the official report that is made of the questioning gives a correct and complete report of what has been said by the suspect.

This protocol ('Best Practice') helps the lawyer to fulfil his role during (police) questioning. It reminds him of his duty to give legal assistance to his clients at the police station. His role is an active one. He is not only a spectator. He is a legal assistance provider. I quote the European Court of Human Rights (in the case of Aras v. Turkey):

> "39 (…). It further observes that although the applicant's lawyer was allowed to enter the hearing room during the questioning of the applicant by the investigating judge, the applicant was not given an opportunity to consult him, and his lawyer was not allowed to take the floor and defend him.
> 40. In its Salduz v. Turkey judgement (…) the Court stressed the importance of the investigation stage for the preparation of criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial. In order for the right to a fair hearing to remain sufficiently 'practical and effective', Article 6 § 1 requires, as a rule, access to a lawyer as from the first questioning of a suspect by the police, unless it is demonstrated in the particular circumstances of the case that there are compelling reasons to restrict this right. In the present case, the applicant's lawyer was allowed to enter the hearing room during the questioning of the applicant, however, this was a passive presence without any possibility at all to intervene to ensure respect for the applicant's rights. Furthermore, the restriction imposed concerning access to a lawyer was systematic, pursuant to section 31 of Law no. 3842, and applied to anyone held in police custody in connection with an offence falling under the jurisdiction of the State Security Courts. Accordingly, the Court concludes that the mere presence of the applicant's lawyer in the hearing room cannot be considered to have been sufficient by Convention standards."

The Dutch 'Best Practice' (Protocol) helps the lawyer *and* the police officers not to forget that providing legal assistance is more than just being present in the hearing room during questioning.
